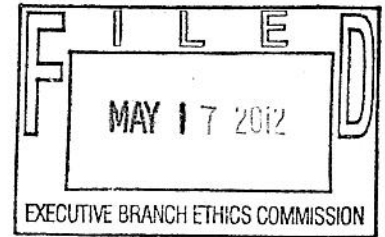


**COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
AGENCY NO. 08-022
ADMINISTRATIVE ACTION NO. 08-EBEC-0343**



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
RECOMMENDED ORDER AND NOTICE OF APPEAL RIGHTS**

BETTY M. ATKINSON

RESPONDENT

* * * * *

An Administrative Hearing was held in this matter on February 7, 2012. The Complainant, Kentucky Executive Branch Ethics Commission, was represented by Kathryn H. Gabhart, General Counsel, with John Steffen, Executive Director, as Co-Counsel. The Respondent, Betty M. Atkinson, Property Valuation Administrator of Powell County, was represented by Luke Morgan, McBrayer McGinnis Leslie & Kirkland. The Hearing was presided over by Susan S. Durant, Hearing Officer, Administrative Hearings, Office of the Attorney General. The following witnesses testified: JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, Department of Revenue, Finance Cabinet; Jill LeMaster, currently an employee of the Kentucky Auditor of Public Accounts, formerly the Executive Director of the Kentucky Executive Branch Ethics Commission; Bill Alward, Muhlenberg Property Valuation Administrator, and formerly President of the PVA Association, and Ms. Atkinson. The testimony of LeMaster and Alward was given telephonically in a previous hearing and was stipulated into the record as if given during this hearing.

The issue in this matter is whether Betty Atkinson as PVA of Powell County violated KRS 11A.020(1)(c) by using her official position or office to obtain financial gain for her daughter, Beth Atkinson, when she promoted her daughter to Chief Deputy in the Powell County PVA Office on December 16, 2005. It is concluded that Betty Atkinson did violate the cited statute.

BRIEF PROCEDURAL BACKGROUND

1. The procedural background for Administrative Actions 08-EBEC-0334 through 08-EBEC-0344 are all the same. The Findings of Fact, Conclusions of Law, and Recommended Order vary according to the evidence presented at the Hearing in each case and the legal arguments made in each case.

2. On October 7, 2008, an Initiating Order was filed in this matter by the Executive Branch Ethics Commission. The Initiating Order in regard to Betty M. Atkinson was one of eleven initiating orders charging various Property Valuation Administrators (PVAs) throughout the Commonwealth with violating KRS 11A.020(1)(c). The charged statute states:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family....

All of the PVAs were charged with violating the Executive Branch Code of Ethics because they employed and/or promoted members of their families.

3. On October 30, 2008, Atkinson, along with the other PVAs, filed an Answer to the Initiating Order. On December 2, 2008, the PVAs, who were all represented by the same two attorneys, filed an Agreed Order Holding Administrative Actions in Abeyance.

4. The administrative actions were stayed while the PVAs prosecuted a declaratory judgment action in Franklin Circuit Court. In that action the PVAs asserted that they were not "public servants" or "officers" as defined in KRS 11A and thus were not subject to the jurisdiction of the Executive Branch Ethics Commission. The Franklin Circuit Court Judge agreed that the Executive Branch Code of Ethics did not apply to PVAs. The Executive Branch Ethics Commission appealed the Franklin Circuit Court judgment to the Kentucky Court of Appeals. On June 18, 2010, the Court of Appeals in an unanimous decision reversed the Franklin

Circuit Court judgment. *See, Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W.3d 472 (Ky. App. 2011). On June 9, 2011, the Kentucky Supreme Court denied discretionary review.

5. On June 13, 2011, Franklin Circuit Court issued an Order of Dismissal that lifted the abeyance of this administrative action. On July 26, 2011, the parties agreed to hearing dates for the first five PVAs' actions. Eventually eight of the original PVA cases were heard.

FINDINGS OF FACT

6. Betty M. Atkinson began as a Deputy in the Powell County Property Valuation Office in 1981 when her brother was the Powell County Property Valuation Administrator. She worked under him from 1981-1985. When he decided not to seek a second term, she left the office. Then when he was re-elected in 1989, she returned to the PVA Office as Deputy. She worked under him until 1998. When her brother decided not to run again, she ran and was elected in 1998. She retired in August, 2008. Transcript of the Hearing at 179. (Hereinafter cited as Tr. at ____.)

7. The Powell County Property Valuation Office has 3 calculated/budgeted deputies. The "snapshot" of the Office in 2005-2006 indicated that there was 1 full-time Property Assessment Clerk, 1 seasonal Field Representative, and 1 seasonal Field Representative Trainee. There was 1 vacant Field Representative position.

8. On July 1, 2001, Beth A. Atkinson was appointed as a part-time Field Representative Trainee on the recommendation of Betty L. Atkinson. Exhibit 7A to the Hearing. (Hereinafter cited as Ex. ____.) According to the Statements of Financial Disclosure admitted into evidence as Ex.s 12, 13, 14, 15 for 2004-2007, Beth Ann Atkinson was a dependent child of Betty Atkinson. Beth Ann lived at her parents' residence in Stanton, Kentucky, from the time of

her initial appointment in the Powell County PVA Office until at least September, 2008. Ex.s 7A-7S. Beth Ann's initial appointment was effective the day after her 18th birthday. Her position title was Field Representative Trainee because as the Fiscal and Personnel Administration, Office of Property Valuation Administrator, handbook for PVAs points out, "A minimum age requirement of 21 years exists for each appointed deputy." Ex. 9 at p.6. Thus Beth was a Trainee rather than a Deputy. Her grade of 5 reflected a lack of higher education and work experience. As a part-time employee Beth could work up to 100 hours a month. She received no benefits except FICA. She received an hourly rate of pay.

9. Beth did benefit from non-discretionary wage increases mandated by the Executive branch. So on July 1, 2002, under the Governor's Wage Equity Program, Beth received a grade increase to 5/3 with an increase in her hourly pay rate. And because she was due for her annual increment on the same date, her pay rate went from \$6.61 per hour to \$6.97 per hour.

10. The next year on July 1, 2003, Betty changed Beth's status from part-time under 100 hours a month to full-time seasonal, Ex. 7D. The seasonal end date was October 1, 2003. Ex. 7G. The change in status was suggested, according to Atkinson, Tr. at 176, by JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, Department of Revenue, Finance Cabinet. Leavell-Greene pointed out that while Beth was in college, she could work more hours during the summer as full-time seasonal and then swap back to part-time during the school term. Tr. at 176. Beth was attending the University of Kentucky in Lexington. She lived on campus during the school term and commuted back to her Field Representative Trainee job in Stanton. Thus began a pattern that continued for several years with Beth working part-time during the college term, Ex.s 7G, 7I, 7M, and full-time seasonal during the summer breaks

Ex.s 7H, 7L . She also continued to get non-discretionary wage increases through the Governor's Wage Equity Program, annual increments, Governor's Health Incentive, and salary schedule changes. By the end of 2004, Beth's grade was 6/3, Ex. 7J, and by the fall of 2005 her hourly pay was \$7.96. Ex. 7M. When Beth was a full-time seasonal employee, she was salaried and earned sick leave days and holiday pay. Tr. at 108. Throughout this period from July, 2001, to December, 2005, Beth was consistently and continuously an employee of the Powell County PVA Office.

11. Finally on December 7, 2005, Betty Atkinson requested that Beth Atkinson be promoted to a full-time permanent position as Chief Deputy in the Powell County PVA Office. During her tenure as PVA Betty had never had a Chief Deputy, although all PVAs are entitled to a Chief Deputy. Now that Beth was 22, she became the Chief Deputy. She jumped from grade 6/3 to 12. Her pay went from \$7.96/hour to \$2,660.00/month which was equivalent to \$16.42/hour.

12. In the PVA Budget "snap shot" for 2008-2009, the office continued to have three employees: Beth as Chief Deputy, a Property Assessment Clerk, and a part-time Field Representative. The Property Assessment Clerk was a grade 7 and her employment began in 1991.

CONCLUSIONS OF LAW

13. KRS 11A.020 provides:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

The provision, as part of the Executive Branch Code of Ethics, became effective on July 14, 1992, and has not been amended subsequently.

14. In her closing argument, Atkinson argued initially that she did not violate the statute because she did not “use her official position or office” for the benefit of Beth Atkinson. Betty Atkinson placed the blame for Beth’s appointment squarely on the Department of Revenue stating that “Revenue is the sole actor and arbiter of this hiring decision.” Respondent’s Proposed Recommendations of Law at 3. (Hereinafter cited as Resp. at __.)

15. KRS 132.590(8), which is cited by the Respondent, indicates that the PVA “appoints” employees, who “may be removed at the pleasure of the property valuation administrator.” The Fiscal and Personnel Administration, Office of Property Valuation Administrator, handbook, Ex. 9, which originated through a conference of PVAs, states: **“All employees serve at the pleasure of their respective PVA, and are at will, unclassified, non-merit, non-P1 state employees.”** Ex.9 p.6. [Emphasis in original.]

16. As JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, testified in regard to Revenue’s role concerning PVA employees:

It’s the PVA’s responsibility to recommend somebody to us [PVA Administrative Support] and our job is to make sure they meet the requirement and then I approve for it to be in the payroll system.

Tr. at 105. Leavell-Greene testified that she did not know whether she knew that Beth was Betty’s daughter when she signed the Request for Personnel Action to promote Beth to Chief Deputy. Tr. at 127. Anyway, Revenue is not the enforcer of the Executive Branch Code of Ethics. It is the Executive Branch Ethics Commission who enforces the Code. KRS 11A.080; KRS 11A.100.

17. The second flaw in the statutory charge according to Atkinson is that “financial gain” must be “unwarranted or in conflict with the interests of the public at large.” Resp. at 5. Initially, it must be observed that the policy behind the Code of Ethics begins:

It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

(a) A public servant be independent and impartial;

....

(c) A public servant not use public office to obtain private benefits; and

(d) The public has confidence in the integrity of its government and public servants.

KRS 11A.005(1). Justice Stephens' concurrence in *Caudill v. Judicial Ethics Committee*, 986 S.W. 2d 435 (Ky. 1999), which is favorably referenced by Atkinson, appears to be especially useful in the context of this matter. The problem with financial gain connected with nepotism, which is a particular form of favoritism, is, as Justice Stephens, concluded:

The evil that I believe anti-nepotism provisions are designed to combat is the appearance of impropriety which has the inevitable effect of undermining the public's trust in a given institution.

Id., at 439. As the Complainant Commission has emphasized, what is at issue is not Beth Atkinson's qualifications or her compensation, it is the favoritism with which an employee was hired or promoted because of a family relationship. As Atkinson's testimony indicated, PVA offices can almost become hereditary fiefdoms. Atkinson's immediate predecessor as PVA was her brother, so that for 24 years the siblings controlled the PVA Office in Powell County. Tr. at 179. The Chief Deputy position was kept open for 7 years so that Betty's daughter would be in a position to lead the Office. Bill Alward testified, Tr. at 74, when he became PVA in 1989 he was advised to hire family members:

And, that I think the general gist was that we were a small office and we were like a small business in America, and that's built on family business and that's kind of the way we operated.

18. Atkinson also raised as an affirmative defense "Violation of the doctrine of *stare decisis*." According to *Black's Law Dictionary*, Seventh Edition, *stare decisis* is: "The doctrine

of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” Atkinson argues that the Ethics Commission violated *stare decisis* because Advisory Opinion 93-94 stated that KRS 11A.020 (1)(c) contained no prohibition to the employment of family members and Advisory Opinion 04-34 stated that KRS 11A.020 (1)(c) prohibited such employment.

19. In the first year of its existence, the Executive Branch Ethics Commission, under the authority of KRS 11A.110(1) issued Advisory Opinion 92-10 which concluded that PVAs were covered by the Executive Branch Code of Ethics. Advisory Opinion 93-24 then followed in response to a query as to whether the Executive Branch Code of Ethics “disallowed” PVAs’ employing relatives. Advisory Opinion 93-24 stated “the Executive Branch Code of Ethics does not specifically prohibit the employment of relatives in PVA offices. However. . .” [Emphasis added.] The Commission then cited KRS 11A.020(1)(a) and (c) and concluded: “The Commission envisions certain circumstances where conflicts of interest could arise under such employment. The Commission encourages your agency to follow policies to avoid any real or perceived conflict of interest in this area.” In short, the Commission did not state that the Code prohibited nepotism, but it did warn that employing family members could create conflicts of interest. Advisory Opinion 93-24 seemed to issue a “word to the wise,” the Commission knowing that many PVAs traditionally had family members in their offices.

20. In its post-hearing closing the Ethics Commission agreed that Advisory Opinion 93-24 did state that family members could work in the same office—but family favoritism would not be permitted. A PVA could create a conflict of interest by hiring members of his own family. The Opinion indicated that family members already employed in an office could remain.

21. On September 30, 2004, the Commission on its own motion again took up the

issue of family members being employed in the same state agency as a public servant. The occasion was recent investigations within the Department of Parks which revealed that Parks and other state agencies needed further guidance. Advisory Opinion 04-34 again recited KRS 11A.020(1) and then proceeded to more explicitly set out problem areas:

[T]he Commission believes that KRS 11A.020(1)(a), (c) and (d) serve to prohibit a public servant from advocating or influencing in any way the employment, appointment, promotion, transfer, advancement of a member of the public servant's family to an executive branch position of employment that the public servant directly supervises or manages.

Specifically, employees should not be involved in interviewing, recommending, or approving family members for positions within their employing agencies

22. Jill LeMaster, who was the Executive Director of the Executive Branch Ethics Commission from 1993 until May 31, 2008, testified in response to a question about the difference between Advisory Opinion 93-24 and Advisory Opinion 04-34: "I don't believe it's a change. I believe the original opinion just said that the statute doesn't specifically spell out the prohibition." Tr. at 14. LeMaster stated that the Commission always thought that public servants should not give an advantage to family members. Tr. at 14.

23. On July 29, 2007, the Ethics Commission issued Advisory Opinion 07-19 which reviewed nepotism under the Code of Ethics and amended Advisory Opinion 04-34. The Opinion stated that Advisory Opinion 04-34 pointed out that KRS 11A.020(1)(a), (c), and (d) prohibited advocating or influencing employment actions in regard to family members. The Opinion then took up the persistent problem of how to deal fairly with family members who were already under the supervision of a family member and had been for many years. The Opinion reiterated that since Advisory Opinion 04-34, public servants should not have been involved in the employment, supervision, or promotion of family members.

24. Advisory Opinion 07-19 urged a layer of supervision between a family member

and a public servant to remove as much potential for conflict as possible. However, as Betty Atkinson testified, there was no chain of command in her office because it would be “kind of silly” with only three employees. Tr. at 172. The Hearing Officer agrees that there was no effective barrier between Betty and Beth.

25. Although the advisory opinions have not been uniformly hard-nosed about conflicts of interest in the form of nepotism in regard to public servants, they have consistently said that public servants’ employing, promoting, and supervising their family members created conflicts of interest. The Advisory Opinions started out gently in their warnings in 93-24; became quite firm in 04-34; and then relented a bit in 07-19 in regard to previously employed family members. LeMaster stated that the Commission’s Opinions and enforcement were always reactive rather than proactive, because the Commission had only 5-6 employees. Tr. at 35.

26. Although it is useful to point out that the advisory opinions wavered a bit in the firmness with which they dealt with family members in the same office with a public servant, *stare decisis* is not relevant to this matter. Advisory opinions are just “opinions.” They offer guidance; they are not judicial precedents established through litigation.

27. Atkinson also offered as an affirmative defense “Violation of the Doctrine of Contemporaneous Construction.” This doctrine used in this context is quite similar to *stare decisis*. The doctrine as defined in *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky., 1991) means that “In most cases, an agency’s interpretation of its own regulations is entitled to substantial deference. ... A construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight.” In this instance, advisory opinions are used as interpretations or regulations according to Atkinson. Therefore, because of contemporaneous construction, as stated in *In re Hughes & Coleman*, 60 S.W.3d 540, 543 (Ky.,

2001): “An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”

28. The Hearing Officer, as previously stated, concludes that the focus of the nepotism opinions shifted slightly but there was no significant contradiction. Advisory Opinions 93-24, 04-34, and 07-19 were rational elaborations that provided a chain of coherent advice.

29. The final legal argument made by Atkinson is that the Commission had violated KRS 13A.120 by issuing unauthorized guidance concerning conflicts of interest and nepotism in the advisory opinions and by not promulgating specific anti-nepotism regulations. KRS 11A.110 (1) clearly gives the Commission the authority to “issue and publish advisory opinions on the requirements of this chapter for those who wish to use the opinions to guide their own conduct.” Atkinson also suggested that OAG Opinion 88-15 which found “no specific authorizing regulation for the Personnel Commissioner and the Personnel Board to promulgate regulations concerning nepotism,” somehow prohibited the Executive Branch Ethics Commission from concerning itself with nepotism. Resp. at 8. The Hearing Officer does not find it persuasive to argue that because the Personnel Board or the Personnel Commissioner cannot promulgate regulations against nepotism, the Legislature could not give the statutory authority to another administrative body to deter conflicts of interest or favoritism in the form of nepotism in the executive branch of the state government.

30. The statutes that are cited by Atkinson as being permissible anti-nepotism statutes are concerned with members of electric and water plants of third-class municipalities (KRS 96.172), members of boards of trustees of state universities (KRS 164. 225), local school boards (KRS 160.180), school councils for school-based decision making (KRS 164.345), and school superintendents and principals (KRS 160.380). These statutes support the view that the

Commonwealth has wide reaching concerns about the nefarious impact of nepotism on the local as well as the state level.

31. Further, the above-cited statutes indicate that nepotism can be dealt with through statutes and does not require regulations. *Hagan v. Farris*, 807 S.W.2d 488 (Ky., 1991), and *Department of Education v. Gobert*, 979 S.W. 2d 922, 926 (Ky., 1998), are relied upon by Atkinson for the proposition that regulations are essential to interpret KRS 11A.020 (1)(c). However, those cases most firmly stand for the proposition that regulations cannot contradict statutes. Regulations may be used to “flesh out” statutes, but KRS 11A.020(1)(c) does not suffer from any vagueness problems.

32. Finally, Atkinson offered Governor Steven Beshear’s Executive Order of June 2, 2008, as a standard against which to judge the arbitrariness of the Commission’s actions in charging Atkinson with violating KRS 11A.020(1)(c). That Executive Order stated that it is the Commonwealth’s policy to provide equal employment opportunities to all people without discrimination because of race, color...ancestry....” The Hearing Officer concludes that this broad affirmative policy set out in an Executive Order opens the doors of opportunity to all within the state. The practice of nepotism means that the door keeper only lets those related by birth or marriage enter the door of opportunity. The Commission’s view of KRS 11A.020(1)(c) supports public trust, impartiality, and the integrity of public servants. It compliments the Executive Order of June 2, 2008.

33. Atkinson’s contrast of KRS 11A.020 (1)(c)’s ethical injunction against a public servant using his office to obtain financial gain for himself or any members of his family with KRS 132.590 (8) concerning the personnel classification system for PVA deputies and KRS 18A.110(5) concerning the Personnel Secretary’s authority to promulgate regulations is not

convincing as a constitutional argument. Nor is Advisory Opinion 07-19 an *ex post facto* law.

34. It is to be stressed that this case was brought under KRS 11A.020 (1)(c)—no Advisory Opinion was cited in the Initiating Order. The Advisory Opinions are useful in providing guidance, but the foundation of the complaint against Atkinson is the statute. The evidence presented at the Hearing is that Atkinson hired her daughter in July, 2001, when she was barely 18 and kept her as an employee throughout her college years even while she was living at a university 43 miles away, then when she was 22, she established her as Chief Deputy, promoting her 6 grades and more than doubling her pay. The evidence was that Atkinson consulted only her personal knowledge in hiring and promoting Beth. She apparently saw no conflict of interest in running an office with one full-time employee, despite the fact that she was allowed three full-time deputies—so that her daughter consistently had a job while she was away at college. Atkinson did join with other PVAs in defense of her view of PVA ethical autonomy.

35. The statute states: “No public servant, by himself or through others, shall knowingly . . . use his official position or office to obtain financial gain for himself or any member of the public servant’s family. . . .” The evidence presented at the Hearing was clear and convincing that Atkinson knowingly used her position as PVA to obtain financial gain by hiring her dependent daughter, Beth Atkinson. Because Betty Atkinson has retired, a cease and desist order would not be useful. Although Betty Atkinson is presumed to have known about the law even before she was sworn into office, there was no evidence that she had actual knowledge. Atkinson would have received copies of the Alward-Salyer correspondence of March/April 2007 which discussed the propriety of hiring relatives as PVA employees, Ex.s 5, 6, but by that time Beth Atkinson had been made Chief Deputy. Betty made no more favorable employment decisions on Beth’s behalf after December, 2005.

RECOMMENDED ORDER

On the basis of the above Findings of Fact and Conclusions of Law, it is recommended that Betty Atkinson be ordered to pay a civil penalty of \$2,000 to the Executive Branch Ethics Commission.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110 (4) you have the right to file exceptions to this recommended decision:

- (4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

In order to preserve a right to review by the circuit court, case law requires that a litigant must file exceptions with the board or agency if there is anything in the recommended order with which a party does not agree and desires to appeal.

You have a right to appeal the Final Order of the agency pursuant to KRS 13B.140 which reads in part:

- (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." The Court of Appeals has suggested that an appeal to circuit court is commenced upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

SO RECOMMENDED this 16th day of May, 2012.



SUSAN S. DURANT
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CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was mailed this 16th day of May, 2012, by messenger mail, to:

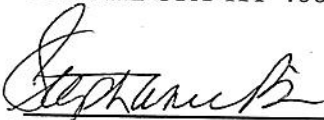
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for filing; and a true copy was sent by first-class mail, postage prepaid, to:

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